Central Law Journal.

St. Louis, Mo., January 20, 1922.

AN ANNOUNCEMENT.

Pending a reorganization of the editorial staff of the CENTRAL LAW JOURNAL, Mr. Thomas W. Shelton of Norfolk, Va., and Mr. C. P. Berry of St. Louis, have graciously volunteered to take care of the editorial work. Both are well known to our readers.

For several years Mr. Shelton has been a contributor to the editorial page. Mr. Berry has contributed valuable articles from time to time, with an occasional editorial and comment on recent decisions. For the past year he has prepared the Annotated Case each week and has selected the cases for the Weekly Digest.

We shall endeavor to keep the Journal close to the standard set for it by the late Mr. A. H. Robbins and believe it could not be placed in better hands for the interest of our subscribers.

CENTRAL LAW JOURNAL CO.,
N. C. ROBBINS, *President.*

THE HARDWOOD LUMBER ASSOCIATION ILLEGAL—THE "GENTLEMAN'S AGREEMENT" REDIVIVUS.

The human interest portrayed in the "Hardwood Lumber Trust" opinion (American Column & Lumber Company v. United States) (Dec. 19, 1921), will give it a prominent and popular place in the professional gallery, apart from the important law it announces, for it has thrown a bomb into many unsuspected camps. For that reason it will command and hold the interest of laymen to whom, as a concrete matter, it most appeals. In the three opinions handed down in the case both contenders will find plenty of food alike for thought and for consolation.

The majority opinion, which is the law, places the stethoscope of analysis upon the human nature of the actors in the interesting industrial drama and diagnoses a lack of rhythm in the organic life of the organization of hardwood manufacturers. It found irregularity in the motive, which is at once the excuse or the condemnation of every human act. There was no duress exercised, the Court found, but there was an impelling persuasion, that of self-interest and fear of condemnation by their neighbors, the greatest movers of mankind. The door to higher profits was flung wide open and human nature could not and did not resist the temptation. That seemed to be the chief objection set out in the majority opinion, prepared by Mr. Justice Clarke.

That the "plan" and the "open competitive plan" reflected great credit upon the minds in which they were conceived is amply evidenced by the indelible impression they made upon the astute and practical Brandeis and the philosophical and poetic Holmes. Said that venerable jurist: "A combination to get and distribute knowledge, *notwithstanding its tendency to equalize, not necessarily to raise prices,* is very far from a combination for unreasonable restaint of trade." Burrowing deep into the souls of the statesmen of business, Mr. Justice Brandeis likewise emerges with the well reasoned conviction that "Congress assumed that the desire to acquire and to enjoy property is the safest and most promising basis for society. And to that end it sought, among other things, to protect the pursuit of business for private profit. * * Its purpose was *merely to prevent restraint.* The illegality of a combination under the Sherman law lies not in its effect upon the price level, *but in the coercion* thereby effected. *It is the limitation of freedom by agreements which narrow a market * * which constitutes unlawful restraint.*" The learned Justice then boldly concludes that "the co-operation which is incident to this plan does not suppress com-

petition." It was upon that rock of human nature that the great Court divided six to three, Mr. Justice McKenna joining with Mr. Justice Holmes and Mr. Justice Brandeis in the dissent.

On the other hand, Mr. Justice Clarke for the majority, concludes: "It is plain that the only element lacking in this scheme to make it a familiar type of the competitive suppressing organization, is a definite agreement to production and prices." In pointing out a perfect substitute, he inferentially compliments the organizers of the scheme by portraying their deep knowledge of human nature and its capitalization, viz: "the disposition of men 'to follow their most intelligent competitors' especially when powerful, by the inherent disposition to make all the money possible, joined with the steady cultivation of the value of harmony of action." This mental philosophy he applies to the weekly meetings; to the regular reports of stock on hand and to prevailing prices, but chiefly to the inspiring editorial communications of the "manager of statistics." He "was a man of large experience in the lumber business, competent and aggressive, and the record makes it clear *that he was in complete and responsible charge* of all the activities of the 'open competive plan'." He "was the clearing house of the plan, and *what he said and did*, acquiesced in by the members, as it was, *must be accepted* as the authoritative expression of the combination."

So there is substantial ground for the belief that the condemnation of the majority fell largely upon the activities of the "manager of statistics" whose methods would have been at fault by any other name or by no name at all. It was he, according to the opinion, who held open the door to the abode of conspiracy and combination, displaying at its portals the lure of "higher prices" the while using the lash of the dreaded threat of "over production." His language is repeated in the opinion by way of emphasis. "Are we guilty?" said he. "If so, the warning is timely." "With this known information before him, it is difficult to see," said the manager of statistics, "how any intelligent hardwood manufacturer can entertain any hesitation as to the proper course for him to pursue in selling his lumber." These were things it appears that might be thought about, if one be human, but must not be given expression.

Evidently astute counsel for the lumbermen saw this weakness and endeavored to extenuate or explain it, for the Court said: "Some disposition appears in the argument, *but not in the evidence*, to suggest that Cadd ("the manager of statistics") exceeded his authority at times, but no objection appears to have been made to any of his conduct." The Court then quotes the letter of one member, who said: "All who have access to your reports bring their prices to the top." The opinion might have set up this letter as a photograph of the result, if not the intent that such pains were taken to ascertain.

It seems fair to assume that no objection appears to the existence of an organization and a discussion by the members of the organization of past prices and past production, so long as the result is not "simply an expansion of the gentleman's agreement of former days, skillfully devised to evade the law." By the same token, it is stated that the openness of meetings, the regular reports to the Department of Justice and the absence of an express agreement for "harmony" in prices and production have no weight. It is the intent alone that seems to count. Very obviously, and for that reason, the opinion blots out all prospect of future lawful combinations effecting a restraint, whatever the method. Mere protestations or declarations of "a fair and reasonable competition" can serve no purpose. The laudable effort to prevent "cutthroat competition" is caught in the wreck. In other words, to quote the Court, "any concerted action *

* to cause, *or which in fact does cause,* direct and undue restraint of competition in such commerce falls within the condemnation of the act (Sherman Anti-Trust Law) and is unlawful." One must leave to a future decision the interpretation of the work "undue."

If we are correct in the above assumption, and we feel content in that view of the Court's opinion, then the minority's contention for the right to organize industrial efforts and exchange experiences as a means of education for the "backwoodsmen," is justified. Moreover, past prices and production my be exhibited when made available to the buyer, seller and public alike. The stock exchange was suggested as an example. Mr. Justice Brandeis' contention that "there is nothing in the Sherman law which would limit freedom of discussion, even among traders," makes so strong an appeal to the common sense, as to lend support to the view just expressed. The condition is, however, that such educational assemblies or emanations shall not intentionally or otherwise eventuate in restraint.

On acount of all which, one feels obliged to conclude that future conventions and associations of business men will open with a prelude of discord; proceed with argument without harmony, and conclude with knowledge without agreement. There may be "co-operation" and there may be "combination" so that, in the words of the Court, "there remains * * only the question whether the system of doing business adopted results in that direct and undue restraint of interstate commerce which is condemned by this anti-trust law." Wherefore, it would appear to resolve itself into a question of fact, and judges like juries disagree upon such things and upon the intent involved. The majority rule prevails in the Supreme Court.

THOMAS W. SHELTON.

NOTES OF IMPORTANT DECISIONS.

INJURY SUFFERED BY EMPLOYEE WHILE LEAVING PLACE OF WORK AS COMPENSABLE.—Where an employee, engaged in shovelling coal, after quitting work for the day, went to a nearby desk on the employer's premises to fill out a card pertaining to his work, and, after he started to leave by going down a nearby stairway on the premises, was injured by a lump of coal thrown by another employee, a finding of the Industrial Board that the injury was received from an accident in the course of his employment cannot be disturbed. So held in Payne v. Wall, Ind. App., 132 N. E. 707.

Touching on this question the Court said:

"This Court has held that: In the application of the Workmen's Compensation Act (Laws 1915, c. 106) a servant's employment is not limited 'to the exact moment when the workman reaches the place where he is to begin his work, or to the moment when he ceases that work. It necessarily includes a reasonable amount of time and space before and after ceasing actual employment, having in mind all the circumstances connected with the accident. Whether an employee, in going to or returning from the place of his employment, is in the line of his employment, is governed and controlled by the particular circumstances and facts of each case. There must, however, be a line beyond which the liability of the employer cannot continue. Where that line is to be drawn is usually a question of fact.' Indiana Creek, etc., Co. v. Wehr, 128 N. E. 765. Under this rule it is clear that we would not be warranted in disturbing the finding in the instant case that appellee received his injuries by an accident in the course of his employment."

LIABILITY OF CITY FOR NEGLIGENCE OF ONE WHOM CHAUFFEUR PERMITTED TO OPERATE TRUCK.—While an employer is not liable for the acts of one not his servant or agent, where a chauffeur, employed by a city to drive a truck, allowed another to drive the truck in accordance with his directions, the city was held liable for injuries resulting to a pedestrian from the negligence of such other person, although the chauffeur violated his instructions in permitting the other to drive. Indianapolis v. Lee, Ind. App., 132 N. E. 605.

In this respect the Court in part said: "It follows, therefore, that under that general rule the city cannot be held liable for Merrill's conduct, if his conduct is to be regarded independently of, separately and wholly apart from Neff's conduct. However, it would be manifestly arbitrary and unwarranted to so consider

Merrill's conduct; for the acts of the two men are so inter-related that it is impossible to form a rational conception of the conduct of either, uninfluenced by the conduct of the other. If Merrill had acquired possession of the truck by force or stealth, and had been operating it without Neff's permission or acquiescence, of course the city would not be liable for Merrill's negligence. But Neff, in violation of his master's express instructions, directed Merrill to operate the truck. Merrill operated the truck under the express permission, in accordance with the directions, and ununder the immediate supervision and control, of Neff; and while thus working together the two men were doing the work which the master had intrusted to Neff, and had directed him to do. Upon those facts the city is liable—not for the negligence of Merrill, but for the negligence of Neff; for Merrill was in fact merely an instrument in the hands of Neff."

EFFECT OF ADOPTION OF PROHIBITION UPON LIQUOR LEASES.

In this article we are not concerned with those instances where a lessee is unable to enjoy the premises he has leased for the conduct of a retail establishment for the sale of intoxicating liquors because he cannot secure the necessary permit or license from the official authorities. In such instances he is not excused from paying the full rent, even though he cannot use the leased premises for any other purpose whatever under the terms of the lease. He could have insisted in such an instance upon a clause releasing him from his obligation to pay rent if he were not able to secure a license or permit; and it is his own folly that he did not. The cases are uniform on this question. [1]

Even where the lease was granted by a city for saloon purposes and subsequently its council passed an ordinance forbidding the sale of intoxicating liquors in the region where the leased premises were situated, it was held that the lessee could not escape the payment, for that reason, of any part of the rent. [2]

An author of decided ability has said: "Impossibility of performance, which is created by a subsequent valid act of domestic law, operates as a discharge of a contract * * * Under the exercise of the police power * * * the legislature may make illegal the performance of contracts already entered into." And he adds: "Such a change of law operates as a discharge of prior contracts which are thus made illegal; since otherwise the law would impose a penalty against the promisor if he performed, and award damages against him if he did not." [3]

The principle thus stated is involved in the validity of liquor leases after prohibition has been adopted.

In a discussion of this question the distinction must be borne in mind between a "permissive" and a "restrictive" lease. The latter being a lease restricting (in this discussion) the use of the lease to a place where only intoxicating liquors may be sold and drunk, and the premises used for no other purpose; and the former where the premises may be used for other business in connection with the sale of intoxicating liquors. Some of the cases turn also upon the point that the primary and principal object of the

(1) Burgett v. Loeb, 43 Ind. App. 657; 88 N. E. 346; Teller v. Boyle, 132 Pa. 56; 18 Atl. 1069; Gaston v. Gordon, 208 Mass. 265; 94 N. E. 307; Standard Brewing Co. v. Weill, 129 N. D. 487; 99 Atl. 661. L. R. A. 1917, C, 929; Ann. Cas. 1918 D, 1143. Hecht v. Acme Coal Co., 19 Wyo. 18; 113 Pac. 788; 117 Pac. 132; 34 L. R. A. (N. S.) 773; Ann. Cas. 1913 E, 258; Miller v. McGuire, 18 R. I. 770; 30 Atl. 966; Burke v. San Francisco Breweries, 4 Cal. App. 198; 131 Pac. 82; Grinsdick v. Sweetman [1909] 2 K 740; 78 K. B. N. S. 162; 101 L. J. N. S. 278; 73 J. P. 450; 25 L. T. Rep. 750; 53 Sol. Jr. 717. American Mercantile Exchange v Blunt 102 Me. 128; Atl. 212; 106 R. A. (N. S.) 414; 120 Am. St. 463; 10 Ann. Cas. 1022.

(2) Burke v. San Francisco, 21 Calif. App. 198; 131 Pac. 83.

(3) Page on Contracts (2 ed.) Sec. 2697. "Now a subsequent law may be the cause of an impossibility, whether by actually forbidding an act undertaken in the contract—which is the direct meaning of illegality—or whether by means of taking away something from the control of the party, as to which thing he has contracted to do or not to do something else." Metropolitan Water Board v. Dick [1918] A. C. 119.

lease was the sale of intoxicating liquors, and the right to sell such things as cigars, chewing gum, soft drinks and tobacco were only incidental to the principal object. It will be observed also that some of the cases turn upon the meaning of the word "saloon" or "bar" or "barroom" as used in the lease; and even where only the word "saloon" is used whether or not other expressions in the lease show that by the use of that term was meant a place where intoxicating liquor was to be sold.

A quite recent New York lease provided that the property was to be used as a "saloon and hotel." The Eighteenth Amendment prohibited its use as a saloon for the sale of intoxicating liquor; and the Court held the lease was terminated thereby.

"While the language does not say *only* for such purposes, or *not for any other purpose*, that is immaterial. Express words of restriction are not necessary where the language used shows that no other use was to be permitted than that specified. In such cases there is an implied covenant not to use the premises for any other purpose. The true rule is believed to be that if the statute adopted after the making of the lease deprives the tenant of the beneficial use of the property—that is, prevents him from using it for the primary and principal purpose for which it was rented—the lease is terminated, although other incidental use might still be made of it.

" We think the lease shows that the use of the premises as a hotel was not to be independent of their use as a saloon, but, on the contrary, that there was only one use contemplated and that was, as the lease states, for a 'saloon and hotel.' It is difficult to conceive of any specific use of premises which would not permit of some other incidental use. And if the specified use was later prohibited by statute, and the tenant thus was prevented from using the premises for the purpose for which they were leased, and for which they were to be used under the terms of the lease, it would be an injustice to hold that the lease was not terminated merely because some incidental use could still be made of the property. Such holding would mean that no lease could be held to be thus ended. We think the sensible and sound rule is that the lease is terminated when the premises may not be used longer for the purpose specified in the lease, and that it is immaterial whether some incidental use might still be made of them. The passage of such legislation created a situation that was not within the contemplation of the parties when the lease was made. It changed the entire situation and brought to naught their agreement. To say the lease continued for some other use of the premises would be to make a new contract. The agreement cannot be carried out, and the court should adjudge that it is terminated."[4]

In Arkansas a lease was made of certain "premises as a hotel and saloon and for no other purpose whatever," at so much a month for five years. Eleven months afterwards the city in which these premises were located adopted a local prohibition ordinance, making it unlawful to sell intoxicating liquors in the leased premises. The claim was that this annulled the lease; and this contention was upheld by the Supreme Court. It was claimed that the word "saloon," as used in the lease, did "not necessarily mean a place where intoxicating liquors are sold, and that the city ordinance prevents the operation only of a saloon for the sale of intoxicating liquors." Inasmuch as the lease provided that it should be void if the county wherein the city was located should "vote dry at the election in 1916" three years after the lease was executed, it was held that the word "saloon" meant a place where intoxicating liquors were sold.

"But it is insisted," said the Court, "that even though it be conceded that the word 'saloon,' as here used, means a place where intoxicating liquors are sold, this would not void the lease, because the keeping of a saloon was not the only business authorized by the contract; and for the further reason that the parties expressly named a condition upon which the lease should be terminated, to-wit, that Pulaski County should vote dry at the general election in 1916, and that, having named one condition which should

(4) Kaiser v. Zeigler, (App. Div.) 187 N. Y. Supp. 638. Doherty v. Monroe Eckstein Brewing Co. (App. Div.), N. Y. Supp. 633; ("Saloon business.") Adler v. Miles, 69 Miss. Rep. 601; 126 N. Y. Supp. 135.

operate to cancel the lease, the parties thereby agreed that the lease should not otherwise be cancelled." This argument the Court did not accept; nor did it accept the contention that the saloon could be used as a temperance saloon for the sale of cigars and non-intoxicating liquors, and the lease thus be upheld. [5]

In Alabama a lease was granted of "the barroom and fixtures known as the Windsor Hotel bar for occupation as a bar, and not otherwise," on May 8, 1907, for a term of five years. On November 23, 1907, the General Assembly enacted a law prohibiting "the sale of, barter, exchange, giving away to induce trade of alcoholic, spirituous, vinous or malt liquors or beverages, which, if drunk to excess, will produce intoxication." The lessee claimed he was released from his lease when the statute took effect; and the Supreme Court of the state so held.

"It will be noted," said the Court, "that the lease includes the barroom and fixtures inseparably, and provides that the room is to be occupied 'as a bar, and not otherwise.' The lessor was bound, under this contract to have permitted the use of the property as a bar and the lessee "was prohibited from using it for any other purpose. 'Bar' and 'barroom' seem to have a more restricted meaning that 'saloon,' and by the great weight of authority mean a place from which intoxicating liquors are to be sold[6]. It is therefore evident that the main, and, indeed, the sole purpose for which the property was leased was that it should be used as a place for selling intoxicating liquors." The Court held that the business became totally prohibited by the subsequently enactment of the prohibition law which forbade and prohibited the very purpose for which the property was leased, saying "that where the act or thing contracted to be done is subsequently made unlawful by an act of the legislature, the promise is avoided. Likewise, where the performance depends upon the continued existence of a thing which is assumed as the basis of the agreement, the destruction of the thing by the enactment of a law terminates the obligation." [7]

An owner leased a certain building and the hotel furniture and fixtures for a term of eight years after May 1, 1903, to be occupied for hotel and saloon purposes. The lease provided that if the lessor was unable to secure for the lessee "two sufficient bondsmen required by law in case of retail dealers in malt and spirituous liquors" then the lease should be void. After taking possession by the lessee local option became operative in the county; and it was held that the lease was void from that day on, the Court saying:

"The local option law which went into effect in the county during the term of this lease rendered the performance of the contract on the part of the plaintiffs (lessors) impossible. They had agreed that in case of failure to furnish and secure bondsmen for defendants as retail liquor dealers the lease should be and became void. It may well be said they contracted with reference to this contingency which has occurred as well as to any other circumstance which would intervene either from their own acts or otherwise. This was a part of the consideration which induced defendants to enter into the lease." [8]

A lease was granted for the purpose of conducting a saloon and selling liquor at retail. The lessee was authorized to sign the consent of the lessor to application for the sale of liquor on the premises. The saloon was to be conducted so as not to injure the reputation of the premises. It was said that any use of the premises, other than for saloon purposes, would be a violation of the lease; and therefore it was terminated by the adoption of prohibition.[9]

(5) Kahn v. Wilhelm, 118 Ark. 239; 177 S. W. 403.

(6) Citing Leesburg v. Putnam, 103 Ga. 110; 29 S. E. 602; 68 Am. St. 80; Spokane v. Bergman, 54 Wash. 315; 103, Pac. 14.

(7) Grell Bros. Co. v. Mapson, 179 Ala. 444, 60 So. 876; 43 L. K. A. (N. S.) 664.

(8) Hoogan v. Mueller, 158 Mich. 595; 123 N. W. 24; 133 Ann. St. 399.

(9) Brunswicke-Balke-Cullender Co. v. Seattle Brewing Co., 98 Wash. 12; 167 Pac. 58. A

In Indiana a lease of premises was granted "to be used and occupied by lessee for saloon purposes, and for no other purpose." State prohibition forbade the sale of intoxicating liquors; and this was held to avoid the lease.[10]

In Washington a lease provided that the leased premises should not be used "for any other purpose than that of a saloon;" but eight days after the execution of the lease the lessee obtained from the lessor permission to use the premises for a bootblack and cigar stand and for restaurant purposes in addition to the saloon, and this permission was inserted in the lease. Before the lease terminated prohibition was adopted in that state, taking effect January 1, 1916. The lease provided that the lessee should purchase all its beer from the lessor. It was held that the lease was dissolved by the adoption of the prohibition act. The Court said that the covenant by the lessee that it "should not use the premises for any other purpose than that of a saloon" was not entirely "modified into a purely permissive use therefor by the modification ingrafted thereon after the lease had gone into effect." "It is clear," said the Court, "that the principal use of the premises desired by both parties was that of a saloon business. The other business was only secondary and incidental thereto." The Court declared it was not impressed with the idea that the "saloon business" did not necessarily mean a business of selling intoxicating drinks; because the word "saloon" "had acquired a very definite meaning in Washington and neighboring states as a place where intoxicating liquors were sold, and was generally so understood." "The fact," said the Court, "that what are commonly called 'soft drinks' are also generally sold at such places does not alter the character of such places as 'saloons,' nor is a place where soft drinks only can be sold commonly known as 'saloons'." The Court also regarded that the clause requiring the lessee to purchase all his beer of the lessor fixed the character of the saloon contemplated by both parties as a saloon where intoxicating liquor would be sold.

To the argument that the lessor had not guaranteed that the lessee should be preserved the continuous right to conduct a retail saloon for the sale of intoxicating liquors, the court said the lessor could not do that; for such a contract would be just as unavailing by reason of the principle that the state under its police powers could render such a guarantee nugatory and unenforcible as against public policy. The Court said:

"Probably, if there had been a clause in the lease stipulating that in the event the saloon business should become unlawful the lease should terminate at once but the lessee should pay all rents reserved for its term, no different question would be presented. Appellants, [lessors] however, would have the lease construed as so implying, and urge that the lessee could have protected itself against such a contingency but did not, and that the condition to conduct a saloon on the premises was a condition for the exclusive benefit of the lessors. Exactly; and so could the lessee have protected itself by a provision contrary to the kind above supposed; and we do not agree that this provision in such a lease as that before us, with the principal purpose that the lessee should conduct a saloon on the leased premises, constitutes a condition for the use of the premises exclusively for the benefit of the lessors, which it might either enforce or waive as it saw fit, or as circumstances demanded."[11]

similar result was reached in Heart v. East Tennessee Brewing Co., 121 Tenn. 69; 113 S. W. 364; 19 L. R. A. (N. S.) 964. 130 Am. St. 753.

(10) Schaub v. Wright (Ind. App.) 130 N. E. 142. An exclusive agreement by a saloon keeper to buy beer for his retail trade was held annulled by the adoption of prohibition, because he could not sell the beer. Pabst Brewing Co. v. Howard (Mo. App.); 211 S. W. 720.

(11) Stratford v. Seattle Brewing & Malting Co. 94 Wash. 125; 162 Pac. 31; L. R. A. 1917 C. 931. In another case in this same State the premises were desired for "a first class saloon, and not to be used for any illegal or immoral purpose," for a definite period of time. The argument was that the lease conveyed an estate in land which could not be destroyed by intervening legislation prohibiting saloons, but such provision destroyed only the covenant for

A lease in Florida was made of three stores adjoining each other, with a frontage of 60 and a depth of 95 feet, "together with the floors immediately above the stores for the purpose of carrying on a wholesale and retail business, both or either, and other storage purposes." One of the stores "was to be used on the first floor only for a first class barroom for white people;" the other room "to be used for a barroom for colored people." The lease was for a term of three years from April 1, 1913, and was to continue up to and include March 31, 1916. There was a covenant in the lease that the lessee would "not use or permit the premises to be used for any illegal or improper purposes."

The lessee vacated the premises before October 1, 1915. On May 5, 1915, the legislature of the state adopted a statute forbidding the sale of intoxicating liquors in less quantities than one half of a pint, or otherwise than in securely sealed receptacles, and forbade the consumption of such liquor upon the premises when sold.

The defense was that by operation of law the defendant was evicted October 1, 1915, from that part of the premises to be used for barrooms; that he entered into the agreement for the lease of the premises with a view of occupying the entire leased premises and every part of them, and that the store rooms were so located with reference to each other that the occupancy of the entire leased premises was required for the successful operation of any business which he desired to conduct therein; that the right to occupy the entire leased premises constituted a valuable consideration, and was one of the considerations which induced the execution of the lease; and he would not have executed it had it not been for such consideration moving to him, and had it not been for such consideration moving to him his and the lessor's mind would not have met, and the lease would not have been executed.

The trial court overruled a demurrer to this plea, and this was held reversible error.

The Court defined the word "barroom" "as a place where intoxicating liquors are sold to be drunk on the premises where sold;" and said upon the enactment of this statute the operation of a barroom in the state became unlawful. The Court drew a distinction between a lease with permissive terms and one with restrictive terms; and held that the lease should be construed as permissive rather than restrictive; and that the passage of the statute "did not terminate the lease and absolve the lessee from further liability for the rent to the lessor." The Court said:

"It was the duty of the lessees in making the contract to provide against such a contingency. They are chargeable with knowledge that the regulation of the liquor traffic was, at the time the lease was made, a live subject of legislation; and when they assert a claim to release from liability upon this contract to pay rent because of a subsequent enacted statute they should be able to point out the provision of the contract which makes its continued performance unlawful and thereby relieve them from liability under it. In other words, they should be able to clearly show that the lease restricts the use of the premises leased to the conduct of a business which is rendered unlawful by the statute and does not permit its use for a lawful purpose. If there is doubt as to the meaning of the language employed, and such language is reasonable susceptible of a construction which continues such lease in force, the doubt should be so resolved as to give effect to the contract. If in such a case a loss is to be sustained by the tenant, it cannot be said to be occasioned by any act or connivance of the landlord. It results

that specific use which made it illegal by operation of law; that such condition was a condition for the benefit of the lessor, which he might waive or forbear, or the law may annul without in any way defeating the demise of the estate in the land for the term. The Court said that if the clause with respect to a "first-class saloon" was a covenant, it was a mutual covenant of the grantor and the grantee, and has not and cannot be fully performed or executed. It is a covenant for the term and the term is interrupted, and neither can render further performance by reason of the contract being made illegal before the full performance of the covenant." Shepherd v. Sullivan 94, Wash. 134; 162 Pac. 34.

from the failure of the tenant to provide against a contingency which might readily have been forseen." [12]

In Alabama a lease was executed for a building for "saloon purposes." Suit was brought to recover rent for a period after prohibition, and a recovery was allowed. The word "saloon," the Court held, was used in the lease as a place for the sale of intoxicating liquors, "but not to exclude the sale of everything except intoxicating liquors." The sale of intoxicating liquors was prohibited by a city ordinance adopted after the lease went into effect. It appeared that the lessee also sold soda water, lemonade, soft drinks, cigars and tobacco. The prohibition ordinance "was evidently a partial and not a total destruction of the business for which the premises were leased," said the Court and:

"If we apply to the destruction of the business the same rule that we invoke as to the destruction of premises—and we think this would be just and proper in the case at bar—it follows that the tenant was not discharged from liability by reason of the prohibition law. He could in law and in fact have continued to use the premises as a saloon though he could not have sold intoxicating drinks or beverages. His business might not, and, as it was shown by the evidence, would not, have continued to be as profitable as if he could sell intoxicants; never the less he could have continued to sell soft drinks, cigars, cigarettes, tobacco, etc., as he did before. That his business would not be as good after as before the law went into effect was no more the fault of the landlord than it was of the tenant. The contract of lease not having provided against such a contingency, which both parties knew could happen, as it provided against other contingencies, we must leave the liability and loss, if any, where the law leaves it, to-wit, upon the tenant." [13]

A tenant contracted to pay rent for premises containing a description which showed it was a hotel. He was given the privilege of subletting the bar and billiard room. Before his term had expired prohibition was adopted. It was held that he was not entitled to be relieved of so much of the rent as would apply to the barroom. "There has been no eviction of the tenant from the premises by the landlord," said the Court, "or by one holding paramount title, and no condemnation of any part of them. Nor has the law prevented the carrying out of the written contract between these parties * * * The landlord leased to the tenant a certain hotel, including a barroom, cigar stand, etc. The tenant contracted to pay certain rent, that the premises should be used for hotel purposes alone, and that it should be a first-class hotel. The argument for the plaintiff in error treats the lease, so far as it relates to the barroom, as a lease of 'bar privilege' or the right to sell liquor. This is not the effect of the written lease. The landlord leased the premises to the lessee. So far as he was concerned as landlord under the law as it then stood, he gave the lessee the privilege of using a portion of them for a bar or of subleasing. But he did not contract a warrant that the law would remain unchanged, or that there should be any diminution of the rent, if a change occurred. It may be unfortunate for the lessee that he did not anticipate the possibility of the passage of a prohibition law and provide for such a contingency; but that he did not do so does not alter the contract as made. The lessee is still entitled to the occupancy and use of the premises. The landlord who had nothing to do with making the sale of liquor by the lessee impossible under the law, is entitled to his rent. The law has not made it impossible to perform the contract of rental of premises. That must not be confused with the prohibition by law of selling liquor on the rented premises." "Landlords and tenants who make contracts of lease of premises are bound to know that the state has such a power

(12) Christopher v. Charles Blum Co., 78 Fla. 240; 82 So. 765.

(13) Byrne v. Henley, 161 Ala. 620; 50 So. 83; 23 L. R. A. (N. S.) 496. The court cites Houston Ice Co. v. Keenan, 99 Tex. 79; 88 S. W. 197 and San Antonio Co. v. Bureta, 39 Tex. Civ. App. 443; 88 S. W. 368. Followed in In Re Bradley, 225 Fed. Rep. 307.

[police power to prohibit sale of intoxicating liquors], and, in the absence of any provision in the lease for an abatement of the rent in case of the exercise of it, or similar provision, the landlord will not be held to warrant against the possible action of the state in that regard, and the tenant who leases the premises will not be entitled to an abatement of rent because the state prohibits the sale of liquors." [14]

In Texas a clause in a lease provided as follows: "It is understood that the building is leased for the purpose of conducting a first-class saloon." It was held that this clause was not placed in the lease "for the purpose of creating a limitation which would deny to the lessee the right to use the property for any other purpose. The business to which the lessee intended to devote the premises was known to the lessor, and, no doubt the latter, for his own benefit, desired to obligate the lessee to so conduct the business as to cause the least detriment to the premises, and not otherwise to injure the lessor. A restriction was intended not as to any legitimate business, but only as to the manner of conducting the contemplated business. Hence we conclude that the adoption of the local option law did not deprive the appellant of the beneficial use of the premises or relieve it from the lease contract. If the contract was as restrictive as contended, and denied appellant the right to use the premises for any other purpose, then a different question would be presented: but such is not the case." [15]

In Michigan premises were leased "to be occupied for the purpose of operating and conducting a retail liquor business and saloon." This was "construed as permissive in character, rather than as a warranty on the part of the lessors that the premises could be legally so occupied throughout the term." The lessee was held liable for rent covering a period after local option went into force and before the lease expired according to its written terms. "The premises demised could have been used for other than the specified purpose." [16]

Salt Lake City leased a tract of land "for the purpose of conducting a bathing resort, with the privilege of subletting a portion of said premises for bar purposes." After the lessee had gone into possession the city, under a state law, adopted an ordinance prohibiting the operation of a bar upon the premises. It was held that the city, because of the adoption of the ordinance, was not obligated to abate the rent reserved. It was said that the city did not guarantee the plaintiff the right to continue his saloon business. The adoption of the ordinance did not constitute an eviction.

"The mere fact that the saloon business was prohibited did not constitute an eviction, and the plaintiff was not thereby released from paying the rent, nor was it entitled to any abatement thereof. If this plaintiff desired to protect itself against the payment of rent in case the right to maintain the bar on the premises should be prohibited by law, it should have provided for that emergency in the lease. Not having done so, it cannot now complain." [17]

A lease was granted of certain premises "for the operation of a saloon therein, and for that purpose only," and during the first year it was so used. By local option the city went "dry;" and thereby the right to use the premises for the sale of intoxicating liquor was prohibited. "The lease," said the Court, "is not a contract of or for sale of liquors. It is one to pay rent. If it became unenforcible, it did so, because the

(14) Lawrence v. White, 131 Ga. 840; 63 S. E. 63; 19 L. R. A. (N. S.) 966. See also Fitzgerald v. Witchard, 130 Ga. 552; 61 S. E. 227; 16 L. R. A. (N. S.) 519 (City refunding a part of a license fee it had received, after it had adopted a prohibition ordinance while the term of the license had not yet expired.) Followed in J. J. Goodrum Tobacco Co. v. Potts-Thompson Liquor Co. 133 Ga. 776. 66 S. E. 1081; 26 L. R. A. (N. S.) 498.

(15) San Antonio Brewing Co. v. Brentz, 39 Tex. Civ. App. 443; 88 S. W. 368. An almost identical case is Kerley v. Mayer, 10 Misc. Rep. 718; 31 N. Y. Supp. 818. Affirmed, 155 N. Y. 636; 49 N. E. 1099.

(16) Hyatt v. Grand Rapids Brewing Co. 168 Mich. 360, 134 N. W. 22.

(17) Warm Springs Co. v. Salt Lake City, 50 Utah 58; 165 Pac. 788; L. R. A. 1917 F. 713.

parties are deemed to have impliedly agreed that, in the event of loss of right to carry on its business, occasioned by acts or occurrences of the contract should cease or become voidable." The Court held that as it was not shown the lessee abandoned the leased premises as soon as prohibition was adopted, nor made a tender back of their possession, it would be presumed he was still occupying them, and could not, for that reason, avoid his liability to pay rent for the period he occupied them. [18]

Premises were leased "to be used and occupied as a cafe and for no other purpose whatever." Before the lease expired the Eighteenth Amendment went into force. The Court held that the lessee could not escape payment of rent for the period of time the leased covered after the amendment took effect. The Court said that the lease was not restricted to a single purpose; and, therefore, it was "not invalidated by a subsequent enactment prohibiting the use for one of the several purposes contemplated by the lease." [19]

A lease for years provided that the lessee might conduct a saloon on the premises, in conformity with the ordinances of the city and the laws of the state then in force or that might be thereafter be enacted. It was held that the lease was permissive and was not avoided by the adoption of local option after its execution; and therefore the lessee could not avoid the payment of rent covering a period after such adoption. [20]

So it has been held that a provision in a lease that the premises may be used for a saloon, accompanied by another provision how, if so used, the business should be conducted, was held to create a permissive and not a restrictive use, and the lessee could not successfully refuse to pay rent on account of the adoption of prohibition. [21]

Another phase of the question under discussion is where it was unsuccessfully attempted to hold landlords liable on the ground that prohibition had annulled their leases. [22]

W. W. THORNTON.

Indianapolis, Ind.

(18) Koen v. Fairmont Brewing Co., 69 W. Va. 94; 70 S. E. 1098.

(19) Proprietors Realty Co. v. Wohltmann, 112 Atl. 410.

(20) Hayton v. Seattle Brewing Co. 66 Wash. 248, 119 Pac. 739; 37 L. R. A. (N. S.) 432; Ann. Cas. 1912 C. 1050.

(21) Yesler's Estate v. Continental Distilling Co., 99 Wash. 480, 169 Pac. 967. See Beaver & Hoffman Brewing Co. v. Boddie (Ill.), 55 N. E. 49, where it was held that the court could not as a matter of law say that "saloon" meant a place where intoxicating liquors were sold and not a place where was sold soda water. This case involved a question of the granting of a lease by a brewing corporation.

(22) Abadie v. Berges, 41 La. 281; 6 So. 529; Nichols v. Bryne, 11 La. 170; Chase v. Turner, 10 La. 19. A lease provided that the premises were to be "used for the purpose of conducting and carrying on the business pertaining to a general retail liquor establishment." It was held that the premises could be used for other purposes; and that the lessee was liable although prohibition had been adopted. Security T. & T. Bank v. Claussen (Calif.), 187 Pac. 140. Same result, Pearson v. Sullivan (Mich.), 176 N. W. 597. Shreveport Ice & Brewing Co. v. Mandel, 128 La. 314; 54 So. 831; Joseph Schlitz Brewing Co. v. Nielson, 77 Neb. 868; 110 N. W. 746; 8 L. R. A. (NS) 494. The parties may agree that if the sale of liquors becomes illegal the lessee may terminate the lease. Halloran v. Jacob Schmidt Brewing Co. 137 Minn, 141; 162 N. W. 1082; L. R. A. 1917 E. 777. The meaning of the word "saloon" may be controlled by other provisions of the lease. Ibid.

CONSTITUTIONAL LAW—REGULATION OF JITNEYS.

LANE v. WHITAKER.

District Court (Conn.), August 29, 1921.

275 Fed. 476.

Pub. Acts Conn. 1921, c. 77, defines a "jitney" as a public service motor vehicle operated on streets or highways in such manner as to afford a means of transportation similar to that of a street railway company and running on a regular route or between fixed termini. It makes operators of jitneys common carriers, subjects them to regulation by the state Public Utilities Commission, the same as street railroad companies, and requires them to obtain a certificate from the commission, after a hearing, specifying the route and that public convenience and necessity require their operation over such route. From the decision of the commission on an application for a certificate

an appeal lies to the superior court. Held, that the act is not unconstitutional, as denying the equal protection of the laws, nor as taking the property of those affected without due process by conferring arbitrary power on the commission which permits it, in its discretion, to refuse certificates or to discriminate between applicants.

This suit is instituted by the several complainants for an injunction seeking to restrain the prosecuting attorneys of the respective counties, the chief of police of the city of New Haven, and the superintendent of the state police of Connecticut, from enforcing a law recently enacted in the state of Connecticut, which makes it a penal offense for the complainants to carry on their business as jitney bus carriers.

MANTON, Circuit Judge (after stating the facts as above). The plaintiffs have been engaged in the business of operating public motor vehicles in the city of New Haven and own motor busses for this service. They therefore have a property investment in this equipment. They charge a fare to the passengers carried by them. The defendants, except the Connecticut company, are public officials who have as their duty the enforcement of the statute which is here considered. The Connecticut Company is interested in the litigation for the reason that it has franchise grants and runs trolley cars along the streets of New Haven, and is now in competition with the plaintiffs' jitney busses.

The streets are the property of the public. Davis v. Mass., 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71. They are under the control of the public, and therefore subject to the police powers of the state, excepting where the power is delegated by statute upon a municipality or other agency. Hendrick v. Maryland, 235 U. S. 611, 35 Sup. Ct. 140, 59 L. Ed. 385; Nolen v. Riechman (D. C.), 225 Fed. 812. The right to exercise the police power is a continuing one, and may be exercised so as to meet the ever-changing conditions and necessities of the public. Those who make investment for this purpose, as the plaintiffs, do so and hold their property and the right to use it, subject to such other and different burdens as the legislature may reasonably impose, for the safety, convenience and welfare of the public. The state legislature may regulate the use, by automobiles and motor cars, of the highways of the state. Hendrick v. Maryland, 235 U. S. 611, 35 Sup. Ct. 140, 59 L. Ed. 385. It may also authorize municipalities to regulate the use of streets by vehicles and may exclude vehicular traffic. Barnes v. Essex Co. Park Comm., 86 N. J. Law, 141, 91 Atl. 1019.

The legislature of the state of Connecticut by the enactment referred to (chapter 77 of the Public Acts of 1921) provided for the use of the highways through the granting of licenses for persons situated as are the plaintiffs. It declared the operation of the jitney to be that of a common carrier, and subjected persons or corporations so operating jitneys to the restriction of the Public Utilities Commission. It provided that reasonable rules and regulations should be made by the commission with respect to routes, fares, speeds, schedules, continuity of service and the convenience and safety of passengers and the public. It required the person, association or corporation to obtain a certificate from the Public Utilities Commission, specifying the route over which the jitney may operate and the service to be furnished, and that the public convenience and necessity require its operation over such route. It required written application be made and notice to be given to the towns through which the route or part thereof was proposed, and to any common carrier operating over any portion of such route or over a route substantially parallel thereto. A public hearing is provided for, as is the method of giving notice thereof. The commission has authority to grant the certificate of necessity and convenience, also the licensing of its operation, and has jurisdiction over the lighting, safety and sanitary conditions to prevail. Provision is then made for an applicant who feels aggrieved by the action of the Public Utility Commission to appeal to the superior court of the state in the manner provided for in such appeals from orders relating to street railway corporations for a violation of any order or regulation adopted or established under the provision of the act. A fine of $100 or imprisonment for not more than 60 days or both is provided for a breach of the act. The Public Utilities Commission is authorized to make such rules and regulations; to hold hearings and issue certificates as may be required under the provisions of the act.

In this complaint the constitutionality of this act is questioned. The superior court of the state has held the act constitutional. Derby Bus Corp. v. Whittaker et al., decided January 21, 1921, in an opinion filed by Judge Keeler. It is claimed that the statute violates the federal Constitution for the following reasons:

First, that the act confers arbitrary powers on the Public Utilities Commission, and permits the commission to discriminate against the plantiffs, and therefore denies to them the equal protection of the laws; second, the statute constitutes an unlawful delegation of legislative powers to the administrative body; third, that

it is unconstitutional, and violates the due process of law guaranteed by the Fourteenth Amendment, in that it confers an unregulated discretion and arbitrary power upon the Public Utilities Commission to grant or refuse or revoke a license; fourth, the statute in not requiring the commission to grant a hearing in the issuance, refusal or revocation of a license, denies due process of law.

We think the several objections urged as to the constitutionality of the act are not well founded. As to the first, the claim is that, because the statute provides that all jitney busses are common carriers and shall be subject to the jurisdiction of the Public Utilities Commission, it discriminates against the plaintiffs. The citizen has the right of travel upon the highways, and may transport his property thereon in the ordinary course of life and business; but this is a very different thing than permitting the highway to be used for commercial purposes, as a place of business, for private gain, in running jitney busses. The right, common to all, to the use of highways is the ordinary use made thereof; but where for private gain, a jitney owner wants a special and extraordinary benefit from the highway, to use it for such commercial purpose, the legislature may, in the exercise of its police powers, wholly deny such use or it may permit it to some and deny it to others, and this is because of the extraordinary nature of such use. And where the legislature grants the permission to use the highway, it may do so under regulations which are common to all applicants. They may grant, refuse or revoke the license, and in so doing the legislature may permit of rules and regulations when such use is granted. This it has done in the act in question, by providing that a body created under the law (the Public Utilities Commission) may make such rules and regulations and grant such license when public convenience and necessity require it.

It is essential that motor vehicles on the highway used for such purposes should do so with safety to the public, and that owners should contribute to the maintenance of the highways by such payments as may be required with such grant. In examining the act, we are satisfied that it is clear that the legislature, in comprehensive terms, intended a regulation which is for the interest and convenience of the inhabitants of the localities which are on the proposed route. It left the granting or refusal of a license, and the regulations as to the sanitary conditions and safety of the public, with the Public Utilities Commission, and in conferring this power the legislature kept well within the confines of its constitutional limitations. Pub. Service Comm. v. Booth, 170 App. Div. 590, 156 N. Y. Supp. 140.

As to the second, it is argued that the statute "purports to permit" this sovereign power (legislating) to be exercised at the arbitrary discretion and will of the administrative body. We find nothing in the act in question which grants to the Public Utilities Commission purely legislative powers. The state could, as it did, grant to the Commission the right to provide rules applicable to the particular situation, and provided for the investigation of facts before granting a certificate of convenience and necessity, all with the view to making such orders as were just for the purpose of the act. A delegation of power to make rules and regulations does not breach the federal Constitution. Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; Interstate Commerce Comm. v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729. Indeed, the legislature might unite the legislative and judicial powers in the same body without violating the Fourteenth Amendment. Prentis v. Atlantic Coast Line, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150.

As to the third, we find no arbitrary power granted to the Public Utilities Commission to say that a certificate should not be granted to an applicant. The act provides that an examination may be held by the Utilities Commission to first ascertain the public necessity and convenience for the route in question and others and the authority is granted to the Commission to issue such license if it is satisfied with the requirement therefor. We are not concerned with what has been described, both on the argument and the briefs, as an arbitrary action on the part of the personnel of the Commission. If there has been such arbitrary action, a remedy is provided for by an appeal to the superior court by the party feeling aggrieved thereby.

As to the fourth, the act provides for a hearing on the application for a license. If the application be denied, provision is made in the act for an appeal to the superior court. Full authority is vested in the superior court under the laws of the state of Connecticut to reverse and direct the Commission to carry out its mandate if the result on such appeal be different than that reached by the Commission. Thus due process of law is accorded to the applicant.

We think the act in question does not violate the federal Constitution and that this motion may not be granted.

Motion denied.

NOTE—*Validity of "Jitney" Regulation.*—The regulation of jitney busses has very generally

been upheld as a proper exercise of the police power, and the right to impose a reasonable license fee follows as an incident of this power. Berry, Automobiles (3rd ed.), § 1516, and the many cases there cited.

The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a right common to all, while the latter is special, unusual, and extraordinary. As to the former, the extent of the legislative power is that of regulation; but as to the latter, its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. Hadfield v. Lundin, 98 Wash. 657, 168 Pac. 516; Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F 840; McQuillin, Mun. Corp., § 1620.

Whatever natural right a citizen may have to traverse the streets of his city with a motor vehicle for the conveyance of his family or his friends, no inherent right exists to devote his vehicle to the public use of carrying passengers for hire and appropriate to himself the use of all the streets for the purposes of profit. Dresser v. Wichita, 96 Kan. 820, 153 Pac. 1194; Huston v. Des Moines, 176 Ia. 455, 156 N. W. 883.

It follows that the business of transporting passengers in the highways for hire is not a business that an individual may engage in as a matter of right, and that such business may be regulated and controlled in the interest of the public welfare to the extent of amounting to a practical prohibition. Le Blanc v. New Orleans, 138 La. 243, 70 So. 212, 139 La. 113, 71 So. 248; Hadfield v. Lundin, 98 Wash. 657, 168 Pac. 516; Lutz v. New Orleans (D. C.), 235 Fed. 978.

No treaty right is violated by such regulatory measures, because the rights of property protected by treaty are such as are capable of sale or transfer, and not such as are purely personal. Lutz v. New Orleans (D. C.) 235 Fed. 978.

The operation of jitneys may be prohibited unless the owner secures a license, and in his application for a license the owner may be required to give a description of his car; to state its seating capacity, and the name, age, and residence of the person to be in immediate charge thereof as driver, and that the driver has attained the age of 18 years; to give the termini between which the jitney is to be operated, and to file a schedule showing the times of departure from the termini. He may be required to display on his jitney bus the number of his city license, although a state license is also displayed. The municipality may prohibit the overloading of jitneys, and may forbid them to draw trailers. It may require them to be brought to a full stop before crossing a railroad of any kind; and may require that the body of the vehicle be lighted after dark. The city may penalize the owner for any infraction of regulatory ordinances applicable to the operation of such vehicle. Huston v. Des Moines, 176 Ia. 455, 156 N. W. 883.

The owner may be required to specify the termini between which he intends to operate, and to operate only over such route, and to pay an additional fee for the privilege of changing the route so established, or of seating capacity. Booth v. Dallas,—Tex. Civ. App.—,179 S. W. 301.

Jitney busses may be required to be submitted to inspection once a week, and prohibited to operate without a certificate of approval concerning their fitness. Booth v. Dallas, — Tex. Civ. App. —, 179 S. W. 301.

HUMOR OF THE LAW.

"Pa, what is a convincing argument?"

"One which agrees with your own ideas on the subject, my son."—*New York Sun.*

"What sort of a woman is Mrs. Bibbles?"

"A model wife," said Mr. Jagsby.

"Yes?"

"When Bibbles winks at a guest and motions toward the cellar she pretends to be interested in what the phonograph is playing."—*Birmingham Age-Herald.*

"And never let me see you back here again!" said the Judge, sternly.

The prisoner looked about, at the jury, at the Judge, at the lawyers, at the court clerks, and replied:

"I won't come back, sir; I'll keep out o' bad company."—*Richmond Times-Dispatch.*

A newly appointed Judge had a "bootlegger" brought into his court and he was in doubt as to how much he should give him. He telephoned to one of his older colleagues and the following conversation took place:

"How much do you think I ought to give him?" asked the young Judge.

"Not more than $6 a quart, and get a couple of bottles for me," said the old Judge.—*Pittsburg Sun.*

"The benefits of prohibition," said Edward Bok at a Y. M. C. A. lecture, "are countless. And not the least of these benefits is the abolition of a certain class of pessimists—that is, the heavy drinker, who, getting up stale every morning from too much booze the night before, inevitably finds life a burden. Many men are like John Horrocks.

"Wishing to administer a gentle reproof to Horrocks one day, I said:

"'Did you ever hear the saying, John, that a man who never drinks, nor smokes, nor stays up late at night, always lives to a great age?'"

"'Yes,' replied John, with a yawn. That's his punishment.'"—*Los Angeles Times.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Automobiles**—Collision.—Driver of motor vehicle should slow down upon entering intersecting street containing railroad tracks.—Cooper v. Vucinich, Cal., 201 Pac. 351.

2.——Driver's Negligence.—Where owner of car allows another to drive it for the purpose of teaching him, or simply to permit such person to practice, owner having full control of the car at all times, such owner is liable for negligence of the driver resulting in injury to third person.—Kelley v. Thibodeau, Me., 115 Atl. 162.

3. ——Due Care.—Where defendant was driving his automobile along a street 40 feet wide and on which there was not much traffic, and plaintiff was ahead of him in a horse-drawn dray on the right-hand side of the road, and the dray stopped, and plaintiff while dismounting on the left-hand side and with one foot in the street, was truck by defendant overtaking and passing, the question whether defendant was negligent in passing so closely to the dray and as to whether he kept careful lookout or should have sounded warning was for the jury.—Cunnien v. Superior Iron Works Co., Wis., 184 N. W. 767.

4. **Bankruptcy**—"Act of Bankruptcy."—A conveyance of real estate by a corporation within four months before the filing of an involuntary petition in bankruptcy against it does not constitute an act of bankruptcy within the Bankruptcy Act, though it hinders and delays creditors in the collection of their claims, where the evidence shows no fraudulent design to do so, but that the conveyance was made to secure past indebtedness and to obtain future advances.—In re C. W. Bartleson Co., U. S. D. C., 275 Fed. 390.

5.——Preference.—Bankruptcy Act, § 60b, providing that a judgment procured or suffered to be entered in favor of any person or transfer of his property within four months from the filing of petition of bankruptcy, where the judgment or transfer operates as a preference, shall be voidable by a trustee in bankruptcy, who may recover the property or its value, is intended merely to prevent a preference of creditors and not that the preferred creditor's debt shall be canceled.—Parker v. Hand, Ill., 132 N. E. 467.

6.——State Law.—Where, because of insolvency, a receiver has been put in charge of corporate assets under the laws of a state or of a territory or of the United States, an act of bankruptcy is committed; that is, when the laws of the state provide for a receivership on the ground of insolvency and are applied to a corporation insolvent in the bankruptcy sense, the act of bankruptcy is complete.—Hiib v. American Smelting & Refining Co., U. S. D. C., 275 Fed. 384.

7.——Taxes.—Under Bankruptcy Act, §64a, providing that the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, etc., in advance of payment of dividends, "and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court," while the United States is not required to file a claim for taxes in the absence of any action on its part, the court has jurisdiction to proceed in invitum to liquidate any such tax, and notice to the collector of internal revenue for the district is sufficient as a condition precedent to such proceeding.—In re Anderson, U. S. D. C., 275 Fed. 397.

8.——Warrant.—Under Bankruptcy Act, § 69, providing for issuance of warrant requiring marshal to seize bankrupt's property and hold it subject to further orders of court, on satisfactory proof that a bankrupt has committed an act of bankruptcy, such warrant would not be issued on the affidavit of one of the attorneys of the petitioning creditors as to statements made to him by certain parties, where answer denied the acts of bankruptcy alleged; the statements, except such as were made by the bankrupts, being hearsay and without probative value.—In re The Hub, U. S. D. C., 275 Fed. 400.

9. **Banks and Banking**—Promise to Pay Draft.—Bank, promising to pay another person's draft, held liable as on an original undertaking.—Bank of Lumpkin v. People's Bank of Athens, Ga., 108 S. E. 835.

10. **Brokers**—Admissible Evidence.—In an action against an administrator for services in purchasing a farm for decedent, testimony of a third person as to conversations between plaintiff and the vendor in the absence of decedent, relating to the purchase, offered solely to show that plaintiff was attempting to purchase the farm for decedent, was admissible; there being no attempt to bind decedent, but to show that plaintiff's effort brought about the purchase and that the commission was earned.—Williams v. Sanderson, Ark., 233 S. W. 1093.

11. **Carriers of Passengers** — Contributory Negligence.—A prospective pasenger standing so close to a moving car as to be struck thereby is guilty of contributory negligence precluding recovery for injuries under counts alleging general negligence only.—Covert v. Rockford & I Ry. Co. Ill., 132 N. E. 504.

12. **Constitutional Law**—Land Registration Act.—The contention that the land registration act is void because the sixteenth and twentieth sections of said act violate the due process clause of the Constitutions of Georgia and of the United States, is controlled adversely to the plaintiffs in error by the decision in Crowell v. Akin, 108 S. E. 791.—Saunders v. Staten, Ga., 108 S. E. 797.

13.——Overdrawing Account.—Laws 1919, p. 220, § 34, making it a crime to overdraw a bank account, or to utter or deliver an instrument overdrawing an account or credit, is not unconstitutional as violative of Const. art. 1, § 1, par. 21, prohibiting imprisonment for debt; such statute providing for the punishment of persons practicing the fraud specified therein.—Hollis v. State, Ga., 108 S. E. 783.

14.——Police Power.—The wisdom of including all employees of a business declared to be hazardous within the statute relating to liability of employers in such business or occupation was pre-eminently for the Legislature, and the courts will not interfere in such cases save where there can be but one opinion as to the mischievious tendency of the statute.—Illinois Publishing & Printing Co. v. Industrial Commission, Ill., 132 N. E. 511.

15.——Rates of Water Company.—Greater New York Charter, § 472, insofar as attempting to authorize the commissioner of water supply, gas and electricity arbitrarily to determine the rates to be charged by a water company, is ineffectual as violation of the due process of law provision of the Constitution, there being no provision for a hearing, as matter of right, on notice, with opportunity to offer proof, and none

being inferable.—Silberberg v. Citizens' Water Supply Co., N. Y., 190 N. Y. S. 349.

16. **Contracts**—Contingency.—If the payment of money is contingent upon the happening of a particular event, and that event does not take place because the defendant prevents it, the money is payable nevertheless.—Adamson v. Alexander Milburn Co., U. S. C. C. A., 275 Fed. 148.

17. **Corporations** — Foreign Jurisdiction. — A corporation cannot be sued in a jurisdiction foreign to that of its organization unless it is there doing business at the time the action is commenced.—Miller v. Minerals Separation Limited, U. S. D. C., 275 Fed. 380.

18. **Deeds**—Undue Influence.—While the want of a valuable consideration for a contract or agreement between husband and wife involving a transfer of property by one to the other is not sufficient to raise the presumption of fraud or undue influence where the consideration, in view of the confidential relation existing between them, is so small as to shock the conscience, its inadequacy may be considered as tending to establish fraud or undue influence. —Hilton v. Hilton, Cal., 201 Pac. 337.

19. **Divorce**—"Cruel and Abusive Treatment." —"Cruel and abusive treatment" are words of comprehensive meaning, and the charge covers a wide range of conduct, and include a husband's willful and unjustified attempt to have his wife committed to an insane asylum, thereby seriously affecting her health.—Michels v. Michels, Me., 115 Atl 161.

20.——New Trial.—Rev. St. c. 65, § 11, authorizing a new trial on a libel for divorce "within three years after judgment," requires merely that the petition for the new trial be filed within such three-year period, and does not require the new trial itself to be granted within such time, in view of the legislative history of the statute and the injustice it would otherwise cause. —Tarbox v. Tarbox, Me., 115 Atl. 164.

21.——**Right to Rents**—On accounting between husband and wife under decree requiring husband to account to wife for one-half of rents from certain properties, husband, not having testified as to rent received from certain properties, could not complain that court's estimate as to rental value, based upon rent paid for similar adjacent property, was arbitrary.—Braecklein v. Braecklein, Md., 115 Atl. 118.

22. **Elections**—Name on Ballots—Since it is incumbent on one applying for a mandatory order requiring public officials to do an act to show, not only their failure to act, but that he has a clear legal right to the relief sought, the court will not compel the board of elections to place on the official ballot for a municipal election the names of two candidates for office who were convicted of criminal anarchy and sentenced to state's prison, where their term would not expire until after the date for the inauguration of the successful candidates for such offices; they being disqualified.—In re Lindgren, N. Y., 190 N. Y. S. 321.

23. **Electricity**—Degree of Care.—One engaged in the business of manufacturing, transmitting and distributing electric current is only required to exercise such care and caution as a person of ordinary prudence might reasonably be expected to exercise in the handling of such a silent and dangerous agency under similar circumstances, and if he places his wires in such a position that they will not inflict injury on a person in the exercise of his rights and privileges, while he is using due care and caution for his own safety he has fully performed the duty which the law imposes upon him.—Austin v. Public Service Co., Ill., 132 N. E. 458.

24. **Eminent Domain**—Test of Value.—The test of value is not the sale price of lots in any subdivision that might in the future be made of the property.—Forest Preserve Dist. v. Wallace, Ill., 132 N. E. 444.

25. **False Pretenses** — Swindle. — That the transaction complained of assumed the form of a legitimate contract is not material, if, in fact, it was a swindling operation.—People v. Sawhill, Ill., 132 N. E. 477.

26. **Fixtures**—Mortgaged Property.—The assignee of a mortgage on two houses subsequently moved to mortgagor's lots, to which it was understood, at the time of the execution of the mortgage, they were to be moved, such agreement being recited in the mortgage, was entitled to foreclosure against a subsequent purchaser of the lots, at least as to the houses.—Doyle v. Lytle Inv. Co., Iowa, 184 N. W. 721.

27. **Frauds, Statute of**—Memorandum.—Where seller of onions applied to a broker to obtain purchasers, and the broker obtained orders and confirmed the sales by letters to the purchasers, the seller cannot contend, in actions for failure to deliver, that the memoranda were not sufficient to constitute a contract under the statute because not signed by the party to be charged. —Weyl, Zuckerman & Co. v. Schnell, N. J., 115 Atl. 182.

28. **Guaranty**—Subsequent Deed.—Where a deed of an acre of land recited that it was conveyed to facilitate the opening of a coal mine on an adjoining forty acres leased by grantors to grantees, and that it conveyed only the surface, and thereafter grantees and a corporation organized by them to take over their lease agreed with grantors to guaranty a royalty until the coal was worked out, the agreement reciting that it was in consideration of the one-acre tract given for triple purposes, and the same grantors, by a subsequent deed, conveyed to the corporation in fee several acres including the acres described in their former deed, but reciting that it was in addition thereto, and for the purpose of conveying additional land, held, that execution of the latter deed did not show an intention to cancel the guaranty contract, but that, reading all three instruments together, they showed an intention not to do so. —Cummins Bros. v Subiaco Coal Co., Ark., 233 S. W. 1075.

29. **Husband and Wife**—Tenants by Entireties. —Where a husband bought land with his own money and took title in himself and wife, they became tenants by the entireties.—State v. Ellison, Mo., 233 S. W 1065.

30. **Injunction**—Cross Claims.—Equity will not intervene to restrain prosecution of suit at law or in admiralty merely because of the existence of cross-claims which cannot be pleaded in such suit, nor unless there are other circumstances, such as insolvency of the plaintiff, which may invoke its jurisdiction.—Susquehanna S. S. Co. v. A. O. Anderson & Co., U. S. D. C., 275 Fed. 355.

31. **Insurance**—Cancellation.—Where a policy of fire insurance provided that it could be cancelled by insurer upon five days' written notice with or without tender of the unused deposit, "which unused paid deposit, if not tendered, shall, when ascertained be refunded on demand. Notice of cancellation shall state that said unused paid deposit, if not tendered will, when ascertained, be refunded on demand" —a notice of cancellation which failed to state that the unused paid deposit, if not tendered, would when ascertained, be refunded on demand, was wholly void.—Artificial Ice Co. v. Reciprocal Exchange, Iowa, 184 N. W. 756.

32.——Deductions.—A life insurance policy provision that if other policies of insurance are in force at the time of death the amount payable shall not exceed amount specified in the table attached, less total amount payable under all other policies by whomsoever issued, is to be construed as referring to life insurance contracts, and did not include a policy of accident insurance under the rule of strict construction and deciding ambiguities against insurer.—Julius v. Metropolitan Life Ins. Co., Ill., 132 N. E. 435.

33.——Delivery of Policy.—Whether an agent had authority to deliver a policy and waived the payment of the first premium and provision in regard to the insured's health on delivery, notwithstanding provisions in the application that the contract should not take effect unless the first premium was paid while insured was in good health, and that no agent could alter the contract or waive its provisions, held for the jury under the evidence.—Thompson v. Travelers' Ins. Co., N. Y., 190 N. Y. S. 338.

34. **Intoxicating Liquors**—"Pending Proceeding."—The filing of an officer's return in conformity with Code Cr. Proc. § 802-b, subd. 3, as added by Laws 1921, c. 156, did not constitute a "pending proceeding" within the provision of such section that seized liquors shall not, pending proceedings, be taken from peace officer's custody by replevin or other process.—Gatto v. Murray, N. Y., 190 N. Y. S. 360.

35.——Seizure.—Under Code Cr. Proc. § 802-b, subd. 6, as added by Laws 1921, c. 156, provides that seizures of liquor on defendant's premises can be made without a warrant only where the unlawful possession is outside of the person's dwelling, while subdivision 2 distinctly specifies the circumstances under which a warrant may be obtained, and seizure in violation thereof is illegal.—In re Horschler, N. Y., 190 N. Y. S. 355.

36. **Landlord and Tenant**—Colored Tenants.—Although landlord may seek thereby to force white tenants to vacate, he may not be enjoined from renting apartment to colored tenants.—Schoolhause v. Browning, N. Y., 190 N. Y. S. 353.

37.——Sufficient Notice.—A notice by lessee to lessor: "Dear Madam: I hereby wish to notify you that I intend to take advantage of my option in my lease of your property at 119 Broadway, Paterson, New Jersey, on or before May 1st, 1920"—held sufficient notice of intent to exercise option to purchase before such date, as provided in the lease, no specific form of notification being required.—Crandall v. Graham, N. J., 115 Atl. 178.

38. **Libel and Slander**—Publication.—Lessees' failure to cancel of record oil and gas leases following forfeiture did not entitle lessors to special damages sustained in action for slander or defamation of title, there being no publication, since leases were in the first instance rightfully recorded.—Barquin v. Hall Oil Co., Wyo., 201 Pac. 352.

39. **Limitation of Actions**—Concealment.—Under G. L. 1863, as to tolling of limitations by fraudulent concealment of the cause of action, the effect of the original act, if fraudulent, whether operating to conceal the cause of action or not, is the controlling factor when defendant does no more than remain silent, and in such case there may be a fraudulent concealment when the act complained of is committed in a manner calculated and intended to conceal itself.—Watts v. Mulliken's Estate, Vt., 115 Atl. 150.

40. **Master and Servant**—Arising Out of Employment.—Ordinarily, where the lunch period is not subject to the employer's control, and the employee is free to go where he will at that time, if he is injured on the street off the premises, the injury does not arise "out of the employment," within the Workmen's Compensation Act; and this was true where three employees had made a voluntary arrangement to eat lunch on the premises, and one was injured by fall on the street, where he was sent by the others to obtain provisions.—Pearce v. Industrial Commission, Ill., 132 N. E. 440.

41.——Assumption of Risk.—Code Supp. 1913, § 4999a3, abolishing assumption of risk by an employee except when in the usual course of his employment it is the duty of the employee to make repairs and remedy defects, is not inconsistent with or repealed by subsequent Workmen's Compensation Act, providing that the employer shall not escape liability if employee is injured in the ordinary course of his employment.—Potier v. Winifred Coal Co., Iowa, 184 N. W. 739.

42.——Casual Employment.—Where employment for one job cannot be characterized as permanent or periodically regular, but occurs by chance or with the intention and understanding on the part of both employer and employee that it shall not be continuous, it is "casual," within Workmen's Compensation Act, § 5, and therefore the irregular employment in lumber yead, for a day or two at a time, of one at such times as he could not secure work at his trade as a molder was a "casual" employment precluding recovery of compensation for injury.—Chas A. Smith & Co. v. Industrial Commission, Ill., 132 N. E. 470.

43.——Contributory Negligence.—Federal Employers' Liability Act, providing that employee's negligence is not a defense, but only mitigates the damages, cannot be nullified by calling the act of an employee the proximate cause of the injury instead of contributory negligence, if the injury was caused in whole or in part by employer's negligence.—Hines v. Sweeney, Wyo., 201 Pac. 165.

44.——"Disability."—"Disability," as used in Workmen's Compensation Act, means impairment or lessening of earning capacity, and not the loss of a member or the permanent loss of the use thereof.—Moses v. National Union Coal Mining Co., Iowa, 184 N. W. 746.

45.——Union Wage Scale.—Where union workmen worked a season for a glass company under a national agreement, providing that workmen reporting for duty on notification should receive certain pay until plant started, and next year they were offered employment and notified to be ready on a specified date, the offer and their acceptance had reference to the terms of the old contract, and therefore the fact that no wage scale was fixed before the date specified was immaterial in determining their right to such pay and they were not bound to inquire before coming concerning the new wage scale.—Model Window Glass Co. v. Moody, Ark., 233 S. W. 1092.

46. **Municipal Corporations**—Invitee.—In an action against a village for injuries to an invitee coming to its power plant, plaintiff could not rely on an express invitation from defendant's employee in charge of the plant, in the absence of proof that he had authority from defendant as alleged.—Coburn v. Village of Swanton, Vt., 115 Atl. 153.

47. **Negligence**—Contributory Negligence.—If husband's negligence contributed proximately to injury to wife, the law will not permit him to benefit by his own wrong, and no recovery will be permitted to her as a recovery for her injuries would be community property in which he would share.—Dunbar v. San Francisco-Oakland Terminal Rys., Cal., 201 Pac. 330.

48.——Contributory Negligence.—Where plaintiff, on entering the vestibule of defendant's bank, saw the official wanted through an open door, apparently behind a counter, and on entering the door without looking to the floor, stepped down a stairway and fell, he having entered the basement door, instead of the adjoining bank door, which was closed, held, that the question of contributory negligence was for the jury.—Downing v. Merchants' Nat. Bank, Iowa, 184 N. W. 722.

49.——Contributory Negligence.—In an action against a shipbuilding company for the death of an electric company's workman, injured while riding in a cabin of a crane which was being moved to test hoisting mechanism on which he had made repairs, with the aid of two other skilled workers who were engaged with him in making the test held, on the evidence as to his experience and knowledge of the dangerous conditions, that the question of contributory negligence in putting his head in a dangerous position was for the jury, whose verdict finding him guilty must stand.—Lyes v. Superior Shipbuilding Co., Wis., 184 N. W. 780.

50. **Perpetuities**—Valid Trust.—A will devising land to a trustee, with instructions to pay the net income in equal shares to named beneficiaries, the share of each on his death to pass, not to his heirs, personal representatives or assign, but to the survivors, created a valid trust, and did not offend the rule against perpetuities; the legal title of the trustee and the equitable interests of the beneficiaries all vesting within the prescribed time.—Cary v. Talbot, Me., 115 Atl. 166.

51. **Principal and Agent** — Misfeasance. — Where a refrigerator company contracts to load and superintend the loading of cars, it cannot escape liability by shifting the burden of its negligence to subordinates.—E. H. Emery & Co. v. American Refrigerator Transit Co., Iowa, 184 N. W. 750.

52. **Sales — Tender** Back. — No recovery of damages in the amount of the entire purchase money paid for an automobile, based on alleged

fraudulent substitution of an old car for a new one purchased, could be had in the absence of a tender back of the old car and a continuing tender or holding of the car for the benefit of the defendant seller, and buyer could not continue to use the car for 15 months before action, and then attempt to set off costs of repairs against the use.—Sutton v. Coleman, Ga., 108 S. E. 803.

53. **Set-off and Counterclaim**—Lien.—In a replevin suit based on special ownership under written lien, a defense of debt due defendant from plaintiff is not exclusively cognizable in equity, but may be set off at law; proof of set-off or payment being authorized by our statutes to show full or partial discharge and balance due.—Strode v. Holland, Ark., 233 S. W. 1073.

54. **Specific Performance**—Statutory Changes. —All contracts for the purchase of land are presumed executed with reference to existing laws and subject to modification, and that a purchaser is not relieved from performance because of Housing Laws 1920, cc. 942-953, when such legislation was being discussed at the time of purchase.—Froehlich v. K. W. W. Holding Co., N. Y., 190 N. Y. S. 324.

55. **Statutes**—Title and Subjects.—The act is not violative of article 3, § 7, par. 8, of the Constitution of this state, which declares: "No law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof."—Crowell v. Akin, Ga., 108 S. E. 791.

56. **Street Railroads**—Humanitarian Rule.—In action for death of driver of truck killed by street car colliding with the rear of his truck while he was fixing a chain leading to towing truck, petition alleging that while deceased was in the act of readjusting chain, and while standing on the ground between said trucks, defendant's car approached from the rear and negligently collided with one of said trucks etc., does not sufficiently plead liability under the humanitarian rule.—Miller v. Kansas City Rys. Co., Mo., 233 S. W. 1066.

57. **Time**—"Thereafter."—Since the word "thereafter," usually used to avoid repetition of a preceding date or event preceded by "after," refers to a time or period following such event or date, and "on," when used to designate a date or calendar division of time, means "in" or "during" a contract to continue to July 1, 1916, and from year to year "thereafter," unless terminated by either party "on" any year thereafter, by giving written notice 60 days prior to July 1 of any such year, could be terminated no earlier than 1917, and, since all the years of such contract began with July 2, the first notice can be effective no earlier than 60 days prior to July 1, 1917, which is the last day of the contract year.—Brandenburg v. Buda Co., Ill., 132 N. E. 514.

58. **Treaties**—Foreign Shipments in Bond.—The provision of the treaty of July 4, 1871, between Great Britain and the United States, giving the right to transport merchandise in bond through the United States to or from British possessions, remains in force and was not abrogated by the National Prohibition Act as to intoxicating liquors, nor does such act by implication repeal Rev. St. § 3005, authorizing transportation in bond through the United States of merchandise in transit between foreign countries and the shipment of whisky in bond through the United States from Canada to Mexico is lawful, and within the rights of the shipper under the treaty and statute.—Hiram Walker & Sons v. Lawson, U. S. D. C., 275 Fed. 373.

59. **Trusts**—Costs.—In an accounting proceeding against a trustee personally, that he may be held to have acted merely under a misapprehension as to the law, but in good faith, so that costs were not awarded against him, is no reason why his costs and disbursements in such accounting action should be awarded against the beneficiary of the trust.—In re Wentworth, N. Y., 190 N. Y. S. 364.

60.——Parol Agreement.—Notwithstanding Ky. St. § 2353, providing that no trust shall result when a deed is made to one person and consideration is paid by another, a parol agreement of grantee to hold property in trust for the use of the one furnishing the consideration is valid and enforceable.—Meadors v Meadors' Adm'r, Ky., 233 S. W. 1053.

61. **Vendor and Purchaser**—Shortage of Acreage.—Where a farm is sold by the boundary without reference to the number of acres and the deed so recites, grantee cannot recover for shortage of acreage.—Wilson v. Morris, Ky., 233 S. W. 1049.

62. **Wills**—Insufficient Evidence.—In daughters' contest of father's will, the unsupported expression of opinion by one of the daughters that her father was of unsound mind a few days before the will was made, and the fact that the testator undertook to dispose of two policies of insurance as if they belonged to his estate, when in fact they were the property of designated beneficiaries, held insufficient for submission to jury of mental capacity.—Baker v. Lemon, Ky., 233 S. W. 1050.

63.——Remainder.—The remainder given by testatrix "on the death of" her husband (to whom she had devised a life estate) equally "unto such of my three children [naming them] as shall be then living, and the surviving issue of any of them who shall have previously" died, the issue of a deceased child to take by representation the portion which would have gone to the parent had he or she survived testatrix husband, vests not on the death of testatrix, but on death of her husband, and so not in a child who died before him.—Lansdale v. Linthicum, Md., 115 Atl. 116.

64.——Statute of Limitations.—In a married woman's action to contest a will, where defendant, though he set up in his answer the statute of limitations in force at the time of probate, and filed a general demurrer to the evidence, did not mention the statute denying the proceedings, nor in his assignment of errors, and argued solely the sufficiency of the evidence on the issue of undue influence and mental incapacity, he will be deemed to have abandoned such defense, and the question whether the disability of a married woman under such statute was removed by Married Woman's Act of 1899 will not be considered.—Rayl v. Golfinopulos, Mo., 233 S. W. 1069.

65.——Termination of Trust.—Where will of the owner of a business and plant manufacturing whisky barrels in terms placed the entire estate in his wife during her life or widowhood in trust to carry on the business, held that, the business having become unprofitable because of national probihition, it was proper to authorize the trustee to cease the operation of the business but, the corpus of the estate being still largely intact and the time fixed by testator for the termination of the trust not having arrived, there should be a continued enforcement of it, by investing the trust property and using the income, or, if necessary, the corpus, for the support of the wife and children living with her.—Stout v. Stout, Ky., 233 S. W. 1057.